No. 92-399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LINDO & MADURO, S.A. *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE GOVERNMENT OF PANAMA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Héve v. State of France, [1935] 1 Sirey 249 (Cour de Cassation, Ch. civ., 6 Feb. 1934), summarized in [1933-34] Ann'l Digest & Reports of Public Int'l Law Cases 511 18

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Frits Kalshoven, "State Responsibility Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol of 1977 and Beyond," 40 Int'l & Comp. L.Q. 827, 835-36 (1991) 17-18

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BRIEF OF THE GOVERNMENT OF PANAMA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

THE INTEREST OF THE AMICUS CURIAE

(a) Statement of the Issues

The petition for certiorari in this case presents two related questions for review. *First*, does the doctrine of sov-

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* Both Petitioner and Respondent have consented to the appearance of the Government of Panama as an amicus curiae, and the written consents are on file with the Clerk. The Government of Panama has previously submitted two Diplomatic Notes to the Government of the United States in connection with this litigation, but these Notes were not accepted by the Court of Appeals on motion of Petitioners. The Diplomatic Notes are reproduced (in Spanish and English) in the Appendix to the Petition.

ereign immunity as practiced in the United States shield the United States government from its obligations under the Hague Convention of 1907 (IV) Respecting the Laws and Customs of War on Land; and *second*, do the obligations under the Hague Convention include responsibility to civilians who suffer damage as a result of a government's failure to comply with the commands of the Convention. The Court of Appeals, in a brief *per curiam* decision in a companion case (Pet. App. 3a), answered the first question in the affirmative, and did not reach the second question. An underlying question, not addressed either by the Court of Appeals or by the District Court (Pet. App. 20a), and but casually referred to in an "Even if . . ." subordinate clause in the opinion of the Court of Appeals (Pet. App. 4a), concerns the applicability to the events of Operation Just Cause of the Hague Convention Respecting the Laws and Customs of War on Land of 1907.

Panama, like the United States, is an original party to the Hague Convention and has a strong interest in its correct interpretation and application. In its submission to the Court of Appeals in one of the related cases, the U.S. Department of Justice asserted that the Convention was not applicable. Other statements of United States officials, in connection with the operation in Panama (1989) as well as analogous instances (Grenada 1983, Iraq 1991), have indicated that the United States does regard the Hague Convention (as well as the 1949 Geneva Convention) applicable in defining the obligations of United States forces in such situations. The Government of Panama sets forth hereafter its own position on the applicability of the Hague Convention. It urges the U.S. Supreme Court to use the opportunity presented by the instant case to clarify the position of the United States on this important issue.**

** The complete text of the Hague Convention No. IV of 1907 is annexed to this Brief.

(b) The Interest of the Government of Panama

The Government of Panama submits this brief because the decision below dismissed with only cursory attention a series of claims by Panamanian citizens and companies gravely damaged as a consequence of actions (and inaction) by the forces of the United States on Panamanian territory in December 1989. When these forces arrived on the territory of Panama, the government assumed that they would comport themselves in full compliance with the requirements of international law. The present action (and companion actions) assert that in fact the armed forces of the United States did not live up to these requirements, and that as a result plaintiffs were seriously damaged.

The government of Panama is not prejudging the factual assertions on which the present action is based. It has a strong interest, however, in having the claims heard on the merits, and in the opportunity of its citizens to obtain justice if it is shown that their injuries were attributable to the failure of the United States armed forces to carry out their obligations under international law. The Government of Panama was confident that its citizens could secure redress in the courts of the United States for their injuries. Thus far, that confidence has not been justified. The Government of Panama therefore looks to the Supreme Court of the United States for the opportunity to have the interests of its citizens vindicated in the courts of the United States.

SUMMARY OF ARGUMENT

1. The invasion of Panama by the armed forces of the United States in December 1989 had as one of its objects the displacement of the *de facto* government of Panama. The invasion gave rise to armed conflict, as defined in international law, and in particular in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land. In light of the contradictory statements in the record of this case and elsewhere, this Court should confirm that as the armed forces of the United States secured

control of Panamanian territory and displaced the Panamanian Defense Forces, the United States took on the status, and assumed the obligations, of an occupant, as defined in Articles 42 and 43 of the Regulations annexed to the Hague Convention.

2. Article 43 of the Regulations annexed to the Hague Convention provides that "the occupant [i.e., here the United States] . . . *shall* take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety. . . ." Article 3 of the Convention provides that a state party which violates the provisions of the Convention "*shall* . . . be liable to pay compensation." As Petitioners have urged, neither of these provisions leaves room for discretion. A state may avoid liability if it proves to a court that it was not "possible," or was not "in its power," to take the measures that would restore or ensure public order and safety. A state cannot avoid liability under the Convention, however, by the assertion that securing of public order was merely one of several items on its agenda, and that the order of priority in addressing these items was a matter of discretion not reviewable by a court, or by denying that it was an occupant.

3. The records of the Second Hague Peace Conference of 1907 reveal that a major motivation in the Hague Convention of 1907 was the adoption of Article III, providing for compensation (*indemnisation* in the French original) by states for violation by their armed forces of the Regulations incorporated into the Convention. Whether the obligation to pay compensation can be vindicated in national courts, as advocated by leading jurists, is not yet firmly established by case law. This Court should make clear that no state is immune from the obligations laid down by the Hague Convention, and that these obligations may be vindicated in the courts of state parties to the Convention.

ARGUMENT

I. THIS COURT SHOULD CONFIRM THAT AS THE ARMED FORCES OF THE UNITED STATES TOOK OVER CONTROL OF THE TERRITORY OF PANAMA, THE UNITED STATES BECAME AN OCCUPYING POWER WITHIN THE MEANING OF THE HAGUE CONVENTION

A. Occupation is a Question of Fact. The Fact is that the U.S. Forces Destroyed the Panamanian Security Forces and Took Control of Large Sections of Panama, Including its Capital City.

Article 42 of the Regulations Annexed to the Hague Convention of 1907 Respecting the Laws and Customs of War on Land, 36 Stat. 2277; T.S. 539; 1 Bevans 631, provides that "Territory is considered occupied when it is actually placed under the control of the hostile army." Article 42 goes on to state: "The occupation extends only to the territory where such authority has been established and can be exercised."[1] Thus, for instance, the United States became an occupant in Panama City and surrounding areas when its armed forces took control of those areas, but not in those areas of Panama where the U.S. forces made no attempt to establish their authority.

It is clear that occupation is a question of fact. There can be no doubt that as of December 21, 1989, the armed forces of the United States took control of Panama City.[2]

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[1] Note that common Article 2 of the Geneva Red Cross Conventions of 1949, 6 U.S.T. 3114, 3217, 3316, and 3516; T.I.A.S. 3362, 3363, 3364 and 3365; 75 U.N.T.S. 31, 85, 135, and 287, contains a similar provision.

[2] See, e.g., Defense Department briefing by Lt. Gen. Thomas W. Kelly, Dec. 22, 1989:

> The city is our primary concern right now. . . . Our strategy was to take on the P.D.F. units first and to take them down. We've pretty much done that. We have turned our attention to the city. We are conducting mopping up operations there, but they are not easy. . . .

New York Times Dec. 23, 1989 p. 13 col. 1.

President Bush himself confirmed this, in his Press Conference of December 21, 1989:[3]

> **Opening Statement**
>
> . . . This operation is not over, but it's pretty well wrapped up. And we've moved aggressively to neutralize the PDF [Panamian Defense Forces] to provide a stable environment for the freely elected Endara Government. . . . General Noriega is no longer in power. . . .
>
> . . .
>
> **QUESTIONS AND ANSWERS**
>
> . . .
>
> **Q.** Mr. President, in light of what you've said about the Endara Government getting started—the need for stability, the need for some kind of police action down there—we really are in a kind of an open-ended military occupation there, aren't we, sir?
>
> ***The President.*** Well, I wouldn't say it's open-ended. . . .
>
> **Q.** Mr. President, just to follow up, if I could, sir. In the planning of this operation, surely you must have recognized that these actions would be needed and some force would have to be on the ground there for a while. What estimate did you have as you undertook this operation as to how long it would take?
>
> ***The President.*** Brit, no number-of-day estimate was given to me. I think everyone recognized some of that would depend on when Noriega was brought to justice, some of that depended on how a restructured P.D.F. behaved.

There is no need here to spell out the events of December 1989. In brief, the facts were that under the re-

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[3] New York Times, Dec. 22, 1989, p. A16, col. 1-6; Public Papers of the Presidents, George Bush 1989-II, p. 1728 at 1729, 1730.

gime of General Noriega, the P.D.F. acted both as a military force and as a police force maintaining order in Panama City, Colon, and other cities of the Republic of Panama. The United States acted to destroy the P.D.F., and assumed responsibility for security in Panama on a provisional basis within the meaning of the Hague Convention. The United States did not, of course, act as a conquering power; no such condition is stated in the Hague Convention. But the United States did seek to exercise control in the territory of Panama, and it exercised that control during the period relevant to the present law suit.[4]

B. Intent, and Particularly Post Hoc Statements Cannot Change the Objective Facts Giving Rise to an Occupation.

In its brief to the District Court in this case, the U.S. Department of Justice argued that the United States did

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[4] Two weeks later, President Bush held another Press Conference:

> **Q.** Mr. President, with General Noriega out of Panama and safely in custody in this country, it seems like you may have a difficult choice in deciding how to maintain order in Panama. Do you envision keeping a U.S. military peacekeeping force there beyond the usual contingent of 12,000 troops, or would you like to see the Panamanian Forces reconstituted?
>
> ***The President:*** One, I'd like to see their police forces, whatever emerges, reconstituted. Two, we will get our forces that went in out as soon as possible. . . .
>
> . . .
>
> **Q.** Mr. President, do you anticipate that the bulk of the additional combat troops sent into Panama will indeed be out by the end of this month [January 1990] . . .?
>
> ***The President.*** . . . As soon as possible. . . Some U.S. forces that went in are already out. So I would look for an early return.
>
> **Q.** General time frame?
>
> ***The President.*** Can't help you.

N.Y. Times, Jan. 6, 1990, p. A10, col. 1-6; Public Papers of the Presidents, George Bush 1990-I, pp. 14, 16.

not assume the status of an occupant within the meaning of the Hague Convention because it did not have the intention to become an occupying power.[5] The Department of Justice relied for this assertion on an affidavit of an Assistant Secretary of State who identifies himself as "directly involved in the formulation of United States policy regarding U.S. political-military relations in Panama."[6] The affidavit states that "the territory of Panama was not placed under the authority of U.S. military forces," and concludes that therefore "the United States did not become an occupying power within the meaning of the Hague Convention No. IV. . . ." The facts, however, were otherwise, and the law is otherwise.

The drafters of the Hague Convention wanted to make sure that states did not say "We didn't mean it," or "some of our soldiers were acting beyond their orders." Even if the intention were as the Assistant Secretary stated,[7] that could not, in the submission of Panama, overcome objective facts.

Formal statements in United States documents not made in connection with this litigation, as well as statements of leading scholars in the United States and abroad, support

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[5] Memorandum of Points and Authorities on behalf of the United States in Support of Motion to Dismiss pp. 9-10, *Lindo & Maduro, S.A. v. United States of America*, Civ. Action No. 90-2589 LFO.

[6] Affidavit of Richard A. Clarke dated Jan. 10, 1991 (i.e., more than two years after the event), attached as Exhibit 3 to Memorandum of Points and Authorities, note 5 supra.

[7] Compare the briefing of General Kelly on Dec. 21, 1989, while the operation was under way:

> The Days Objectives
>
> > Our objectives for today are primarily threefold. One is to continue to support the establishment of a democratic government in Panama. Second, to move into Panama City and restore order there, where most of the disorder appears to be. And the third one is to continue to track Mr. Noriega in an effort to capture him.
>
> New York Times, Dec. 22, 1989, P. A16, col. 2.

this position. The official U.S. Department of the Army Field Manual entitled *The Law of Land Warfare*, FM27-10 (1956) states:

> Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded. (para. 355).
>
> . . .
>
> The exercise of these rights [of the occupying power] results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. (para. 358).

A leading article by a member of the U.S. Army Judge Advocate General's Corps, though recognizing the unusual circumstances of the invasion, concluded ". . . United States conduct in Operation Just Cause was regulated by the full body of international humanitarian law." John Embey Parkerson, Jr., "United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause," 133 Military L. Rev. 31, 43 (1991). Major Parkerson makes clear that by Humanitarian Law he means both the 1949 Geneva Conventions and Hague Convention IV. Id. at 44.

The Government of Panama confirms that, step by step, U.S. forces turned over control of the territory of the Republic to the present government. These good intentions, however, do not change "the facts," as Major Parkerson put it, "that United States forces exerted some degree of control over portions of Panamanian territory for periods of time. . . ." Id. at 81.[8]

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[8] Accord: *1989 Annual Report of the International Committee of the Red Cross*, p. 47:

(continued)

It is not clear that the position on the applicability of the Hague Convention taken by the U.S. Department of Justice and the Assistant Secretary of State actually represents the official position of the United States. The Government of Panama, in fulfilment of its constitutional duty to support the just claims of its citizens, joins petitioners in urging the U.S. Supreme Court to accept the present case for review, in order to clarify the position of the United States on the issue, and to provide unequivocal guidance to its forces, and to the forces of other states, in carrying out their many responsibilities around the world.

II. THE PROVISION OF THE HAGUE CONVENTION WHOSE BREACH GIVES RISE TO THE PRESENT ACTION IS MANDATORY, AND FAILURE TO CARRY OUT ITS TERMS CANNOT FAIRLY BE CHARACTERIZED AS A DISCRETIONARY ACT.

A. The Complaint in this Action Alleges Breach of a Mandatory Obligation, not Failure to Exercise a Discretionary Function

Assuming, then, that the Hague Convention of 1907 was applicable to define the obligations of the United States armed forces present in Panama in December 1989-January 1990, it is necessary to explore what those obligations entailed. The District Court dismissed the complaint in the related case (Pet. App. 20a at 22a-27a), on the basis of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §2680(a), and the Court of Appeals held that this conclusion was correct. (Pet. App. at 4a).

On December 20, following the United States armed intervention, the ICRC reminded both parties of the applicability of international humanitarian law and offered them its services. The regional delegate arrived in Panama the following day to assess the situation and contact the relevant authorities, in conformity with the provisions of the Third and Fourth Geneva Conventions. The US military authorities allowed the ICRC to visit prisoners of war and detained Panamanian civilians in two internment camps in the Canal zone from 30 December . . .

The Government of Panama does not, of course, claim any special expertise in interpreting the United States Federal Tort Claims Act, the construction of which has not always been wholly uniform.[9] It does, however, understand the principle that courts should not substitute their judgment for policy-making decisions of the executive branch of a state, and that even if a decision of policy proves in retrospect to have been mistaken and to have injured someone, such a mistake should not give rise to civil liability against the state. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797 (1984). But if the governing law or regulation is such as to leave no room for discretion, then failure to follow the law or regulation cannot be regarded as covered by an exception for discretionary action. See *Berkovitz v. United States*, 486 U.S. 531 (1988).

In the *Berkovitz* case, involving a claim that plaintiffs had contracted poliomyelitis from defective vaccines, this Court explained that the decision by the relevant government agencies on how to regulate the release of vaccine lots was a discretionary function. If the Bureau of Biologics had decided to conduct spot checks of vaccine lots, and the lot that injured the plaintiff had slipped through, there would have been no liability. *Berkovitz*, 486 U.S. at 536-38; *Varig*, 467 U.S. at 819-20. But if, as in the actual situation in *Berkovitz*, the Bureau had decided to test all vaccine lots, and plaintiff credibly asserted that a given lot was not tested at all or that the test was carelessly performed, then the Bureau (and by extension the United States) would be potentially liable for failing to carry out a duty, and therefore the United States would not be shielded from suit.

On the basis of this distinction, the decisions of the lower courts in the present case seem to have misconceived

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[9] See, e.g. Donald N. Zillman, "Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act," 1989 Utah L. Rev. 687; Harold J. Krent, "Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort," 39 UCLA L. Rev. 871 (1991).

the relation between the Hague Convention and the U.S. Tort Claims Act. The Court of Appeals held that the discretionary function exception applied both to the "planning" and to the "operational" level of the conduct of the U.S. armed forces, and that "even if" the Convention applied, the discretionary function exception would bar recovery. (Pet. App. at 4a). With respect, the Court of Appeals, like the District Court, appears to have conducted the analysis backwards. The proper approach, as called for by international law, would seem to be to ask first whether the applicable convention leaves the question of public order and safety to the discretion of the Occupant. If so, then how the Occupant deals with that issue is a matter of discretion or priorities or political choice, not reviewable by a court. If not, then the existence of discretion cannot arise, because the relevant provisions of the Convention contain obligations, not suggestions or options.

The present action alleges violation of Article 43 by the United States, and in particular of the obligation contained in that article that the occupant "*shall take* all the measures in [its] power to restore, and ensure, as far as possible, public order and safety. . . ." To be sure, the words "all the measures in [its] power," and "as far as possible" call for some type of evaluation. But the Convention does not say "the occupant . . . may take such measures as it deems appropriate. . . ."; it says "the occupant *shall take all the measures in its power.* . . ." and the allegation in the complaint is that the United States forces did not do so, indeed did not during several days of looting make any attempt to do so.[10]

The District Court was not asked whether it was proper for Major Smith or Sergeant Jones to lead his troops down Avenida A rather than Avenida B. That decision would clearly have been a matter of on-site discretion, and under the law of Panama as well as the law of the United States such a decision is and ought to be unreviewable in court.

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[10] See, e.g., New York Times, Dec. 23, 1989, p. A 1 col. 2-3, "CITIES ARE LOOTERS' JUNGLES AS CHAOS CONSUMES PANAMA."

The assertion in the complaint is that *no* instructions or orders were given to the U.S. forces in Panama to carry out the obligation of Article 43, so that even if Major Smith or Sergeant Jones wished to intercede to stop the looting and wanton destruction in Panama City, they would have lacked the authority to do so.[11]

If the assertion made in the complaint is true, the action (or inaction) cannot be regarded as a matter of discretion under international law as set out in the Hague Convention. Surely if United States troops had themselves engaged in pillage, notwithstanding Articles 28 and 47 of the Regulations Annexed to the Convention, which provide that pillage is forbidden, or if the United States had taken plaintiffs' property, notwithstanding Article 46, which provides "Private property cannot be confiscated," it could not be said that claims arising out of such acts would be dismissable on the basis that they arose out of exercise of a discretionary function. A fair reading of the Hague Convention leads to the conclusion that Article 43 here invoked, like Articles 28, 46, and 47 (as well as numerous others) states an obligation, not an option subject to political judgment or discretion.

B. Domestic Law Cannot Shield the United States from its International Obligations; that Law Should be So Construed as to Avoid any Conflict with the Applicable Treaty.

It is a fundamental principle of international law that a state may not invoke a domestic law to avoid an obligation under international law. See, e.g., *Advisory Opinion on Treatment of Polish Nationals in Danzig*, P.C.I.J., ser. A/B, No. 44 at 22 (1932); *Restatement (Third) of the Foreign Relations Law of the United States* §111, Comment

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[11] Note that Article I of the Hague Convention provides:

> The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

a; §115, Comment *b* (1987). The corollary was stated by Chief Justice Marshall about 200 years ago:

> [A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.
>
> *Murray v. Schooner Charming Betsy*
> 6 U.S. (2 Cranch) 74, 118 (1804).

The American Law Institute, linking this statement directly to international conventions, confirms that the principle of the *Charming Betsy* remains the governing principle. Section 114 of the Restatement of Foreign Relations Law (supra) provides:

> Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.

Thus to the extent the contours of the discretionary exemption to the Federal Tort Claims remain undefined,[12] the courts of the United States should so construe that domestic law as to assure compliance with the treaty obligations of the United States, not only to Panama, but to the more than 40 other state parties to the Convention.

It follows that this Court should not let stand, without the most careful consideration, a characterization of action (or inaction) by the United States as discretionary under United States law, when it is clearly non-discretionary under a treaty binding on the United States.

III. THIS COURT SHOULD UPHOLD THE RIGHT OF PRIVATE CITIZENS TO BRING PRIVATE ACTIONS FOR BREACH OF THE HAGUE CONVENTION AS CONTEMPLATED IN ARTICLE III OF THE CONVENTION.

It might be thought that the commands of the Hague Convention, including Article 43 here invoked, Article 46, prohibiting confiscation, Articles 28 and 47 prohibiting pil-

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[12] See, e.g., the Zillman and Krent articles, note 9, supra.

lage, and comparable provisions are addressed only to states, without affording rights to individual claimants. Such an interpretation of the Hague Convention, however, would be contrary to the plain meaning of Article III of the Convention as well as to the holdings of most courts that have had to deal with suits involving the Convention.

Article III of the Hague Convention provides:

> A belligerent party which violates the provisions of said Regulations shall, if the case demands, be liable to pay compensation (*indemnisation*). It shall be responsible for all acts committed by persons forming part of its armed forces.

Joseph Choate, the eminent lawyer who was selected by President Theodore Roosevelt to be chairman of the American delegation to the Second Hague Peace Conference, reported to Secretary of State Elihu Root that the addition of Article III was the major contribution of the conference to the laws of war on land, correcting the gap left by the 1899 Hague Peace Conference, which had laid down appropriate rules for the conduct of armed forces but had failed to clearly establish a requirement of compensation for breach of those rules. See *Report of Delegates to Second International Peace Conference*, [1907] Papers Relating to Foreign Relations of the United States, Vol. 2, p. 1157.[13]

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[13] Ambassador Choate wrote:

> The recent conference revised the convention of 1899, modified it in parts, and added various provisions in order to render the codification as complete and thorough, as accurate and scientific, as the changeable nature of the subject will permit.
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> . . .
>
> In one respect, however, the revised convention clearly surpasses its predecessor, for article 3 of the introduction supplies a sanction for the violation of its provisions.
>
> Id. at 1155, 1157.

Article 3 had two purposes: *First*, Article 3 made clear that states could not hide behind the argument that their forces had disobeyed orders. Liability was to be based on the principle of *respondeat superior*, and without need to prove either negligence or intent on the part of the state itself. *Second*, Article 3 sought to provide individual victims of violation of the Regulations with a cause of action against the responsible state party to the Convention. The sponsor of the amendment that became Article 3 explained the intent of the article as follows:

> It is a principle of private law that whoever, by an act contrary to law, willfully or by negligence, interferes with the rights of others, shall indemnify them for damage caused. This principle is equally applicable in the law of nations and certainly in the cases involved here. However, we cannot limit ourselves to acceptance of the theory of "subjective fault", according to which the State can be liable only if it is established that it was negligent or failed to exercise control. The most frequent case will be one in which negligence cannot be attributed to the government itself. If, in that case, the persons injured as a result of an infringement of the Regulations could not demand reparation from the government and were compelled to take proceedings against the guilty officer or soldier, they would more often than not be deprived of the right to obtain the indemnity owing to them. We believe, therefore, that, for an unlawful act by members of the armed forces contravening the Regulations responsibility lies with their government.[14]

Deuxiéme Conférence Internationale de la Paix, La Haye 15 Juin - 18 Octobre 1907, Actes et Documents, Vol. III, p. 144-145 (1909). The proposal was unanimously adopted,

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[14] Translation from French in Yves Sandoz, *Unlawful Damages in Armed Conflicts and Redress under International Humanitarian Law*, Int'l Rev. Red Cross, No. 228, 131, 137 (May-June 1982).

with both the United States and Panama in the affirmative. Id. Vol. I, p. 87, vol III, p. 627.[15]

Both contemporaneous and current commentators on the Hague Convention confirm that the drafters contemplated direct action by injured persons against the government of a state whose personnel acted contrary to the commands of the Convention. Nowhere in the records of the Second Hague Conference pertaining to Article 3 or in reports of the delegates is there any mention of state espousal of claims of injured private parties. A Belgian scholar whose work on the Hague Convention was published in 1915 explained that

> [Article 3] is justified in law, by the general principles of responsibility, applicable in the law of nations as in private law; and is justified in fact . . . [because] relief would be illusory if it could not be had against the government of the persons [violating the Hague Regulations].

Albert Mechelynck, *La Convention de la Haye concernant les lois et coutumes de la guerre sur terre d'après les Actes et documents des Conférences de Bruxelles de 1874 et de la Haye de 1899 et 1907* p. 99 (Ghent 1915).

A recent study by an eminent Dutch scholar reached the same conclusion:

> [Article 3] is unmistakably designed to enable these people [private claimants] to present their bills directly to the State, i.e. to its competent (military or other) authorities either during or after the war.

Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention

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[15] A number of states voted yes with reservations; neither the United States nor Panama made any reservation to its support for Article 3.

IV of 1907 to Article 91 of Additional Protocol of 1977 and Beyond," 40 Int'l & Comp. L.Q. 827, 835-36 (1991).[16]

While no case has been reported exactly on all fours with the present action, a number of cases in other countries have upheld private claims depending on the Hague Convention No. IV and breach of the annexed Regulation. See, e.g., *Bilotte v. Groos and the State of the Netherlands*, Dist. Ct. Arnhem, the Netherlands, June 24, 1948, [1951] Nederlandse Jurisprudentie No. 261, [1949] Ann'l Digest and Reports of Int'l Law Cases 493; *Johansen v. Gross*, [1950] Norsk Rettstidende p. 326 (Norway), [1949] Ann'l Digest 481; *P. v. A.G. K. and P.*, (Fed'l (Supreme) Ct. Switzerland), [1948] Ann'l Digest 594; *Dawson Bank Ltd. v. Ko Sin Sein* Burma, High Court Burma, Sept. 15, 1960, Chief Court May 8, 1963, 36 Int'l L. Rep. 497. Perhaps the closest case to the present one came before the Supreme Court of France in 1934, arising out of the occupation by France of territory then under German sovereignty, and requisition there of a saw mill belonging to plaintiff. *Havé v. State of France*, [1935] 1 Sirey 249 (Cour de Cassation, Ch. civ., 6 Feb. 1934), summarized in [1933-34] Ann'l Digest & Reports of Public Int'l Law Cases 511. France, the occupying power, had tendered compensation to plaintiff for the property seized by its military forces, but plaintiff considered the compensation inadequate within the meaning of the Regulations annexed to the Hague Convention. The former owner brought suit against the State of France in an ordinary civil court; plaintiff did not prevail on the merits, but no challenge was raised or even doubt expressed as to his standing to assert his claim for violation of the Hague Convention directly against the oc-

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[16] Professor Kalshoven, Professor of International Humanitarian Law in Leiden University, goes on to contrast the intent of the drafters with state practice under Article 3, and concludes that state practice has proved disappointing, resulting "in its original meaning and purpose receding into the background." Id. at 836-37. The present case offers an opportunity to restore Article 3 to its original meaning and purpose.

cupying power.[17] No case in any country has come to the attention of the Government of Panama or its counsel (other than the decisions in the present and related actions) rejecting a private claim involving the protection of the Hague Convention on the ground that the Convention does not create a cause of action.[18]

Of course not every state has provision in its domestic law for suits against the government. When a state has such a law, as the United States does, it would seem entirely appropriate for its courts to entertain claims under such a law, to demonstrate to the world community that the United States continues in the forefront of respect for international law.

This Court wrote about the Hague Convention 46 years ago:

> We do not make the laws of war, but we respect them so far as they do not conflict with the commands of Congress or the Constitution.

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[17] In a comment to the published report of the case, Professor Charles Rousseau emphasized that the fundamental principle, upheld in the case, was the principle of compensation ("indemnisation") as set down in the Convention. Id. at 251.

[18] The only court to so hold was the Court of Appeals for the Fourth Circuit in one of the cases related to the present case, *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). The court there stated:

> International treaties are not presumed to create rights that are privately enforceable. . . . Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action. . . . The Hague Convention does not explicitly provide for a privately enforceable cause of action. Moreover, we find that a reasonable reading of the treaty as a whole does not lead to the conclusion that the signatories intended to provide such a right.

As demonstrated by the sources cited above, this conclusion reflects a misreading or misunderstanding of the Hague Convention, and should not be permitted to stand unreviewed by this Court.

In re Yamashita, 327 US 1, 16 (1946). There is surely no conflict between any command of Congress or the United States Constitution and assertion in U.S. courts of claims by citizens of Panama under the Hague Convention. At minimum, this Court should grant review of the summary disposition of this and companion cases by the lower U.S. courts, so that the issues here only touched upon may receive thorough exploration.

CONCLUSION

The late Judge Richard R. Baxter, the United States member of the International Court of Justice, wrote that "[t]he first line of defense against international humanitarian law is to deny that it applies at all."[19] The effect of the dismissal of the present cases on the basis of the discretionary function exception to the Federal Tort Claims Act or a misreading of the Hague Convention is a denial that the obligation to secure public order and safety exists at all. This Court should not permit such denial to stand unreviewed and unexamined.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted

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[19] Richard R. Baxter, "Some Existing Problems of Humanitarian Law," in The Concept of International Armed Conflict: Further Outlook, p. 1 at 2 ((Brussels 1974).

APPENDIX

APPENDIX

Hague Convention No. IV
Respecting the Laws and Customs of War on Land

18 October 1907

(36 Stat. 2277; Treaty Series No. 539; 1 Bevans 631.

[Here follows the list of Sovereigns and Heads of State who sent Plenipotentiaries to the Conference.]

Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where an appeal to arms may be brought about by events which their solicitude could not avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and render more precise in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

They declare that it is in this sense especially that Articles 1 and 2 of the regulations adopted must be understood.

The High Contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their Plenipotentiaries:

[Here follow the names of the Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

ARTICLE 1.

The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

ARTICLE 2.

The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not

apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

ARTICLE 3.

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

ARTICLE 4.

The present Convention, duly ratified, shall replace as between the Contracting Powers, the Convention of the 29th July, 1899, respecting the Laws and Customs of War on Land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

ARTICLE 5.

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the Representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments

of ratification, shall be immediately sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

ARTICLE 6.

Non-Signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 7.

The present Convention shall come into force, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

ARTICLE 8.

In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying power, and one year after the notification has reached the Netherland Government.

ARTICLE 9.

A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 an 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2) or of denunciation (Article 8, paragraph 1) were received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

In faith of which the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October, 1907, in a single original, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

[Here follow signatures.]

ANNEX TO THE CONVENTION. REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION I. ON BELLIGERENTS.

CHAPTER I. The Qualifications of Belligerents.

ARTICLE 1.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

ARTICLE 2.

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war

ARTICLE 3.

The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II. Prisoners of War.

ARTICLE 4.

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5.

Prisoners of war may be interned in a town, fortress, camp, or other place, under obligation not to go beyond certain fixed limits; but they can only be placed in confinement as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

ARTICLE 6.

The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

ARTICLE 7.

The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing on the same footing as the troops of the Government who captured them.

ARTICLE 8.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

ARTICLE 9.

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have curtailment of the advantages accorded to prisoners of his class.

ARTICLE 10.

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

ARTICLE 11.

A prisoner of war can not be compelled to accept his liberty on parole; similarly the hostile Government is not

obliged to accede to the request of the prisoner to be set at liberty on parole.

ARTICLE 12.

Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the Courts.

ARTICLE 13.

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks fit to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

ARTICLE 14.

An information bureau for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. The function of this bureau is to reply to all inquiries about the prisoners, to receive from the various services concerned all the information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The bureau must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special charter. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the information bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

ARTICLE 15.

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

ARTICLE 16.

Information bureaus enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

ARTICLE 17.

Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where

they are detained, the amount to be ultimately refunded by their own Government.

Article 18.

Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever Church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

Article 19.

The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Article 20.

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

Chapter III. The Sick and Wounded.

Article 21.

The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

Section II. Hostilities.

Chapter I. Means of Injuring the Enemy, Sieges, and Bombardments.

Article 22.

The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE 23.

In addition to the prohibitions provided by special Conventions, it is especially forbidden—

a. To employ poison or poisoned weapons;

b. To kill or wound treacherously individuals belonging to the hostile nation or army.

c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

d. To declare that no quarter will be given;

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;

f. To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

h. To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ARTICLE 24.

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Article 25.

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Article 26.

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Article 27.

In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Article 28.

The pillage of a town or place, even when taken by assault, is prohibited.

Chapter II. Spies.

Article 29.

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for

the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

Article 30.

A spy taken in the act shall not be punished without previous trial.

Article 31.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Chapter III. Parlementaires.

Article 32.

A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

Article 33.

The commander to whom a parlementaire is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the parlementaire temporarily.

Article 34.

The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery.

Chapter IV. Capitulations.

Article 35.

Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

Once settled, they must be scrupulously observed by both parties.

Chapter V. Armistices.

Article 36.

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Article 37.

An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Article 38.

An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities

are suspended immediately after the notification, or on the date fixed.

Article 39.

It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Article 40.

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Article 41.

A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary; compensation for the losses sustained.

Section III Military Authority Over the Territory of the Hostile State.

Article 42.

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as

far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ARTICLE 44.

A belligerent is forbidden to force the inhabitants of occupied territory to furnish information about the army of the other belligerent, or about its means of defence.

ARTICLE 45.

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

ARTICLE 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

ARTICLE 47.

Pillage is formally forbidden.

ARTICLE 48.

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

ARTICLE 49.

If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the

occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

ARTICLE 50.

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

ARTICLE 51.

No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

ARTICLE 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ARTICLE 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the prop-

erty of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depôts of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE 54.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

ARTICLE 55.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

ARTICLE 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.